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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1600

BOMBARDIER LIMITED and
BOMBARDIER EAST, INC.,
PETITIONERS,

v.

ENGINE SPECIALTIES, INC.,
RESPONDENT.

BRIEF OF RESPONDENT, ENGINE SPECIALTIES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Jurisdiction

On July 26, 1979, the Court of Appeals entered judgment in this case *nunc pro tunc* July 25, 1979, affirming the judgments below for plaintiff Engine Specialties, Inc. ("ESI") against defendants Bombardier Limited and Bombardier East, Inc. None of those parties filed a Petition for Rehearing.

On August 3, 1979, a Petition for Rehearing was filed by Durham Distributors, Inc. ("Durham") and Watercraft Sales Center, Inc. ("Watercraft"). Durham and Watercraft were two sub-distributors of ESI. They had obtained judgments in the trial court, but those judgments were reversed by the

Court of Appeals on the ground that Durham and Watercraft lacked standing. Their petitions for rehearing addressed the question of those co-plaintiffs' standing only. On September 21, 1979, the Court of Appeals granted a rehearing, but expressly limited the rehearing to "the issue of the standing of Durham and Watercraft to recover under the horizontal restraints theory" (See Order dated September 21, 1979, attached hereto as Appendix I). On February 4, 1980, the Court of Appeals entered a "judgment" reaffirming its prior ruling on standing and ordering "that the corrected judgment entered July 26, 1979, *nunc pro tunc*, remains in effect". Not until April 14, 1980 (almost nine months after judgment was entered for ESI against Bombardier and Bombardier East), did Petitioners file the instant Petition seeking review of the judgment in ESI's favor.

A petition for a writ of certiorari must be filed within ninety days from the date of entry of the judgment which the Supreme Court is requested to review. Rule 34. A petition for rehearing or motion to amend a judgment will toll the running of the ninety day period only where the issue addressed in the petition is "inextricably linked" to the issues involved in the judgment which is the subject of the petition for certiorari. See *United States* v. *Adams*, 383 U.S. 39, 41-42 (1966).

This Court has refused to consider petitions for certiorari filed more than ninety days after the judgment by the Court of Appeals where (as here) a subsequent judgment "had no effect on the merits of the decision that... [the Supreme Court is] now asked to review in the petition for certiorari". *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211 (1952).

Since the petition for rehearing addressed only the issue of Durham's and Watercraft's standing, and the allowance of the petition by the Court of Appeals was also expressly limited to that single issue, the petition for rehearing had no bearing whatsoever on the issue that this Court is now asked to review

— defendants' liability to ESI. That question was decided by the Court of Appeals on July 26, 1979. The filing of an unrelated petition for rehearing did not toll the ninety day period for filing a petition for certiorari. Therefore, the instant petition was not filed within the time set forth in Rule 34, and this Court has no jurisdiction to entertain it.

Questions Presented

1. Was this Petition timely filed?
2. Should a defendant who failed to object to instructions, and, indeed, who specifically assented thereto, be permitted to assign those jury instructions as error on appeal?
3. Was it illegal *per se* under the Sherman Act for Bombardier, which was about to enter the North American market with its own minicycles, to agree not to compete and to divide markets with Agrati-Garelli ("Agrati"), a manufacturer of minicycles which was then active in the North American market?
4. Was the agreement not to compete between Agrati and Bombardier any less illegal because one version of that agreement also provided for the creation of a joint venture, which never materialized, between the parties?
5. Where the plaintiff was terminated as Agrati's distributor in order to effectuate the agreement not to compete, and because it refused to participate in that agreement, and where ESI was also the target of acts designed to drive it out of business, was ESI injured by that which made the defendants' conduct illegal under the antitrust laws?
6. Where Bombardier and Agrati, as part of their agreement not to compete with one another, conspired to, and did, drive ESI out of business by the use of unfair means and predatory conduct, and where Bombardier thereby captured a significant share of a relevant market, did ESI have an independent cause of action under the antitrust laws?

Counterstatement Of The Case

The Court of Appeals carefully and accurately stated the facts of this case. (A3-10). These facts, in summary, are as follows:

In 1970, defendant Bombardier, "the world's largest manufacturer of snowmobiles" (A4, App. 89, 5378-5403)[1] and "a giant in the recreational vehicle field" (A29), had developed and successfully tested a small motorcycle product called a minicycle. (A4, App. 10, 1936-7, 4735-4743). It needed a summer product to sell to its snowmobile distributors and dealers. It planned to commence selling its minicycle in 1971. (A16).

At the same time, Agrati, an Italian company, manufactured a minicycle, which was distributed in North America on an exclusive basis by ESI. (A4).

Bombardier and Agrati each feared competition by the other. Between August and November 1970, a series of meetings were held and communications exchanged between Bombardier and Agrati which are described by the Court of Appeals. (A4-10). In August 1970, Bombardier and Agrati met in Canada. Agrati was immediately impressed by Bombardier's manufacturing capability and its vast distributing network. Bombardier was impressed by Agrati's minicycle product. Bombardier apprised Agrati of its intention to enter the market in competition with Agrati, but "expressed an interest" in the Agrati minicycle. Proposals for the joint manufacture or marketing of minicycles were discussed. Agrati informed Bombardier of its exclusive distributorship contract with ESI. Bombardier was undaunted. It informed Agrati that Agrati would have to make a decision with respect to the proposals under discussion "very quickly" because Bombardier was "considering manufacturing its own product". (App. 3103-6, 3216-3220, 3230; See A6).

[1] Citations to the Record Appendix in the Court of Appeals will appear with the prefix "App.". The Court of Appeals decision is attached to the Petition as Appendix A and is referred to herein as "A".

The threat of competition was not lost on Agrati. Its president later warned ESI's president:

> "That he had been to Canada, he had visited their plant; they were very big; they were very formidable; they were very thorough in that they had Broncco bikes, [the Agrati manufactured minicycles then being sold by ESI] up there which they had dissected and made a study of; and I would be well-advised that—to join up with them in some way and to listen to what they are saying, because they would bury me anyhow..." (App. 1341-2)[2]

In September 1970, Bombardier and Agrati met again. Detailed proposals were discussed, including an agreement not to compete and for large purchases of minicycles by Bombardier from Agrati. (App. 4753-4). The parties also discussed ways of "getting around" ESI's distributorship contract which stood in the way of Bombardier's and Agrati's plans. (App. 4754, 4766). At one point, ESI's president was summoned. On his way into the meeting with representatives of Bombardier and Agrati, he was warned by Agrati that:

> "...they, the Bombardier, was coming into the motorcycle business, anyhow, and that they were so big and powerful that we had just better listen to them or, you know, get run over by them." (App. 1334-1335; See A4-5).

ESI was then offered the opportunity to participate in an agreement not to compete with Bombardier and Agrati.

[2] The Court of Appeals observed "There is no gainsaying that Bombardier possessed the economic muscle to overwhelm ESI...and to induce Agrati to cooperate with it." (A25).

Several proposals were discussed. (App. 1337-1342). In the presence of Bombardier's officers, Agrati's president told ESI's president that:

> "Mr. Agrati, as I said, opened the meeting. — that Bombardier was coming into the motorcycle business; that they were going to be a very formidable competitor — we are going to — you know, they were just so big and powerful that it insured them success. . .—".
> (App. 1337-1342).

ESI declined to participate and insisted that its contract be honored. (App. 1344. See A25). After further consultation with Bombardier, Agrati agreed to, and did, terminate ESI's contract, effective May 1971 and Bombardier undertook to market its own minicycles in 1971. They agreed to cooperate after 1971. (App. 4756).

That, however, was not good enough for Bombardier. During October 1970, Bombardier became increasingly dissatisfied with its own minicycle. It came to believe that other minicycles in the same price range, especially the Agrati minicycle, offered "more sophisticated features" than did its minicycle. (App. 93-4, 4800). As a result, Bombardier again used the threat of competition. It pressed Agrati for a more immediate agreement not to compete, pointing out "it is essential for [Bombardier] to make an immediate move in the motorcycle field" and stating that while Bombardier preferred to join forces with Agrati, "if that is not possible, [Bombardier] would...have to look elsewhere."[3] (App. 5004; See A5).

On November 4 and 5, 1970, representatives of Agrati and Bombardier met in Philadelphia. It was decided that Agrati

[3] Of this and other similar statements, the Court of Appeals said: "Bombardier stands as a giant in the recreational vehicle field. Its extensive network of dealers and distributors and its expressed intentions to look elsewhere for a competing product should Agrati fail to reach an agreement with it led inexorably to the division of markets." (A29).

would declare that ESI had breached its contract with Agrati and was thus subject to termination if the breach continued for twenty days. (App. 2255-65). ESI was to be given no warning of Bombardier's and Agrati's intentions. (App. 2274-83; A6).

It was further decided that Agrati would sell to Bombardier immediately and Bombardier would hold its minicycle off the market. As a final inducement, Bombardier agreed to share in the payment of any damages that Agrati might be required to pay to ESI. (App. 2288-93, 3253-7, 4837).

On November 6, 1970, after a telephone call from the meeting in Philadelphia to Italy, Agrati cabled ESI demanding that ESI open a letter of credit, and reminding ESI of the May 1971 termination date. No mention was made of Bombardier's and Agrati's intention to cut off ESI in twenty days if the letter of credit were not opened. (App. 4726; A6).

Without waiting to see if the letter of credit would be opened, Bombardier and Agrati met in Italy on November 12-18, 1970. A written contract was drawn up and initialled by the presidents of Bombardier and Agrati. (A7). In the contract, which is described in detail by the Court of Appeals at A7-8, Bombardier and Agrati agreed (1) that they would not compete in the manufacture, assembly, or sale of motorcycles in North America during the term of the agreement, (2) that Agrati would sell its minicycles exclusively to Bombardier for resale in North America, (3) that a Canadian company would be formed by Bombardier and Agrati to manufacture and market minicycles in North America, and (4) that in the event that either party finalized a completely new product in the motorcycle field, that product would be offered to Bombardier or the proposed Canadian company for manufacture and sale in the North American market. Bombardier agreed to indemnify Agrati in the event of legal action by ESI — a provision upon which Agrati's lawyer insisted.[4]

[4] This agreement provided, *inter alia:*

> "...none of the parties hereto will manufacture and/or assemble nor act as agents for the sale of motorcycles in North

On November 25, 1970, as required by its written non-competition agreement with Bombardier, Agrati terminated ESI. (App. 4729, A7). It gave ESI no prior warning of its intention to terminate ESI and cut off ESI's source of supply. The jury found that this termination was a breach by Agrati of its contract with ESI. (Answer to Special Interrogatory No. 6, A11), and that Bombardier intentionally induced that breach (Answer to Special Interrogatory No. 7; A11). The Court of Appeals said that ESI was terminated on the basis of a "trumped up charge of default". (A29).

In February 1971, Bombardier and Agrati agreed to eliminate the "joint venture" feature from their agreement and to provide that the joint venture would be formed only if the parties, after study, agreed that a joint venture would be feasible (App. 4842, 4847-50). The same modification, however, re-stated the express agreement not to compete. In fact, the proposed joint venture aspect of the Bombardier/Agrati agreement never became operative. (A21).

America, either directly or indirectly, during the terms of this agreement. . . .

. . . .in the event that Bombardier or Agrati-Garelli develops and finalizes a completely new product in the motorcycle field, this product should be mutually offered in the following manner: -if they are products developed by Agrati-Garelli (in the range 50cc to 100cc), they should be offered to Bombardier for sale and manufacture *in North America;* —if they are developed by Bombardier and are in the range of over 100cc., they should be offered to Agrati-Garelli for sale and manufacture through its motorcycle distribution organization but Bombardier will keep the right to sell them through its own distribution organization *outside North America.*" (PX 53, App. 4847-8) [emphasis supplied]

The agreement thus went far beyond the mere "joint venture" which Bombardier now claims, but expressly proscribed any competition between Bombardier and Agrati in either the sale or manufacture of any type or size of motorcycles in North America, and expressly allocated the products and the parts of the world where each would be permitted to sell.

Not content with breaching ESI's contract and cutting it off without warning, the defendants then set out to destroy ESI as a competitive force in the minicycle market by the use of what the Court of Appeals called "an array of misdeeds". (A28). To that end, defendants engaged in the following conduct:

(1) Bombardier and Agrati conspired with Agrati to cut off ESI's source of supply in November, 1970, without any warning, having misled ESI into thinking that Agrati would continue to sell to ESI until May, 1971. By this device, ESI and its distributors were deprived of their most important product and of the "lead time" necessary to develop a good substitute product.[5] (A30).

(2) Bombardier and Bombardier East used surreptitious and dishonest means[6] to gain confidential trade and technical information regarding ESI's inventory and pricing policies. (A8).

(3) Having thus obtained information respecting ESI's pricing, defendants intentionally priced the Agrati minicycles (which had been awaiting shipment to ESI[7]) at a price lower than ESI's price for its remaining inventory of the identical product (A8). The sudden appearance of these Agrati/Broncco vehicles, theretofore exclusive to ESI and its distributors and dealers, at Bombardier dealers and at very low prices, had a

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[5] ESI immediately undertook a "crash program" to develop and market a substitute product in the middle of the model year, an effort which, not surprisingly, proved unsuccessful. (App. 1517-19, 2422; A30).

[6] Defendants hired a private investigator to secretly purchase Broncco minicycles (App. 2283-8) and the assistant to defendants' president in charge of their minicycle product (Graham) obtained confidential information about ESI's pricing and inventory by misrepresenting himself to ESI's comptroller as a prospective ESI distributor (App. 5012; A8).

[7] Bombardier decals were simply pasted over the "Broncco" decals on Agrati's inventory in Italy, and the vehicles were shipped to Bombardier. (App. 2236, 4885).

devastating and demoralizing effect on ESI's distributors and dealers throughout North America. (App. 1472-1473; 1517-19; 3949-50; 3972-73; 3989).[8]

(4) For a long period of time, Agrati refused to sell any spare parts to ESI and thereafter agreed to sell parts only on onerous terms (App. 1393-8). Bombardier tried to keep Agrati from selling parts to ESI at any time or for any price (App. 4872-79; A8-9). The further demoralization of ESI's dealers which resulted from their inability to get parts was described by several witnesses. (App. 2201-2; 2976-7).[9]

(5) Defendants circulated false rumors at trade shows about ESI's demise and published press releases in a way calculated to demolish whatever remaining credibility ESI had with its distributors and dealers. (App. 3650-2; 4880-1; 3418-19; A9).

As a result of all of the above, ESI went from a growing profitable company, to a company which suffered a loss of $261,000 in 1971 and a loss of $816,000 in 1972, and which finally closed its doors in 1972.[10] (A10).

On the basis of the facts described above, the jury found

[8] See, for instance, testimony of co-plaintiff Watercraft's salesman (Westhouse) respecting reaction of Broncco dealers when the Agrati minicycles began to appear at Ski-Doo dealerships across the street. (App. 2471-2499).

[9] In September 1971, the District Court entered a preliminary injunction prohibiting Bombardier from selling Agrati minicycles or parts therefor. Bombardier continued to sell parts. On July 26, 1972, the District Court found Bombardier to be in willful contempt of court, a finding which the Court of Appeals affirmed (A39). Bombardier's conduct after the preliminary injunction exascerbated ESI's injury.

[10] By contrast, ESI's pretax profits between 1968 and 1970 were as follows:

1968	$19,708
1969	$35,527
1970	$63,809

($124,000 prior to extraordinary and non-recurring expenses). (A10).

that Bombardier had the intent and ability to market minicycles of its own manufacture in competition with Agrati, but that it agreed not to compete with Agrati. It found that Bombardier conspired with Agrati to eliminate ESI as a competitor and to drive ESI out of busi. ss, and that it used unfair means to do so. (Answer to Special Interrogatories Nos. 3, 4, 8 and 10; A10-11). Not surprisingly, the jury also found that ESI was injured by Bombardier's conduct. (Answer to Special Interrogatories 3, 4 and 9, A10-11).

Summary Of Argument

This is a case which turns on the trier of fact's assessment of testimony over nine (9) weeks of trial,[11] and a careful (indeed painstaking) consideration of all legal contentions by the courts below.

Not only is the Petition not timely filed (see pp.1-3, *supra*) but the two "Questions Presented" in the Petition are not even properly before this Court. Each was expressly waived by defendants' assent to jury instructions at the trial (pp.14-16; 24-26, *infra*).

Moreover, the questions raised were rightly decided on the facts of this case, and there exists no "conflict between the circuits" or "disarray" among the lower courts with respect to either of the questions raised by Bombardier.

Finally, in view of the fact that the jury made specific findings based on abundant evidence, that defendants had engaged in predatory conduct with the specific intention of driving ESI out of business, thereby adversely affecting competition in the relatively narrow submarket in which ESI's minicycles competed, independent grounds for affirming the judgment below exist (pp.35-37, *infra*).

[11] The liability phase of the trial consumed five weeks, after which the damage phase proceeded for an additional four weeks. The Record Appendix consists of almost 6,000 pages of trial transcript and exhibits.

Reasons For Denying The Petition

I. The Petition Should Be Denied Because Bombardier Conceded in the Trial Court, and the Court of Appeals Correctly Ruled, That an Agreement Between Potential Competitors to Divide Markets and not to Compete is a *Per se* Violation of the Sherman Act Under *United States* v. *Topco Associates, Inc.*

The jury expressly found that Bombardier and Agrati-Garelli were potential competitors at the same level of distribution—the manufacture and sale of minicycles. Answer To Special Interrogatory No. 8. (A11). Its finding was based upon substantial evidence. That evidence included (1) the testimony of Bombardier's president that it was the agreement between Bombardier and Agrati "that caused [Bombardier] not to come into production with its own minicycle" (App. 3203-4); (2) Bombardier's stipulation that in 1970 it "developed and manufactured a limited number of [minicycles]...and tested them with good results" (App. 90);(3) Andre Bombardier's testimony that by August, 1970, Bombardier "had almost completed the development of a minibike" (App. 2234-5); (4) Bombardier's president's memorandum to its Board of Directors which states that the initial agreement between Bombardier and Agrati, made in September 1970, was that "Bombardier will put this year on the market the minibike (Fun-Doo) developed by Bombardier" (App. 4756); (5) Bombardier's internal schedules, prepared in October 1970, which called for production to commence in November 1970 and for the "retail introduction" of Bombardier minicycles to commence by March 1, 1971 (App. 4798, 4804); (6) the cable sent to Agrati by an intermediary, in October 1970, which informed Agrati that Bombardier intended "an immediate move in the motorcycle field" (App. 5004); (7) the

statements of Agrati's officials that Bombardier was about to enter the minicycle market and would "bury" ESI in the process (App. 1341-2) and (8) Bombardier's stipulation that by early 1971, there was "no part of a motorcycle that we cannot produce". (App. 103-104). On this evidence, and far more, which the Appeals Court carefully reviewed (A16-18), the Court concluded that there was ample support for the jury's finding that by November 1970, Bombardier had the "intent and ability" to enter the minicycle market by the summer of 1971. Bombardier does not seriously contest this finding.[12]

The jury found that Bombardier and Agrati agreed to refrain from competition with one another in the manufacture and sale of minicycles in North America. That finding was based, in part, upon oral testimony, and in part upon a written agreement which expressly provided (a) "that none of the parties hereto will manufacture and/or assemble, nor act as agents for the sale of motorcycles in North America, either directly or indirectly, during the term of this agreement", (b) that Bombardier alone would manufacture and sell existing Agrati products and all new Agrati products with 50cc-100cc engines in North America and (c) that all motorcycle products developed by Bombardier with engine sizes larger than 100ccs were available to Agrati for exclusive manufacture outside North America (App. 4847-8). The Court of Appeals correctly determined that the jury had properly concluded that Bombardier and Agrati agreed not to compete, and that the written agreement "rises to the level of a territorial allocation of markets". (A18-20). Bombardier does not dispute that ruling.

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[12] In its Petition, Bombardier does suggest, in passing, that it was not about to enter the market and characterizes its minicycle a "hand-built prototype", "which witnesses for both sides disparaged as crude and unmarketable". Bombardier fails to mention that the vehicle it brought to court was only a preliminary model, and that its president admitted at trial that a (theretofore undisclosed) more advanced, "sexier version" had been developed, but not brought to court. (App. 3191-2). In any event, the question was one for the jury.

Bombardier's contention is that on the facts of this case, an agreement not to compete between these two imminent (but not yet actual) competitors was not a *per se* violation of Section 1 of the Sherman Act. It further argues that if an agreement not to compete is embodied in a contract which also calls for a joint venture between the contrating parties, it must be analyzed under the "rule of reason", even if the joint venture agreement is never effectuated. Bombardier's contentions do not present significant questions which merit consideration by this Court. Bombardier expressly waived this issue in the trial court, and nothing in the decision below conflicts with any decision of this Court or any other Court of Appeals.

A. *Bombardier Assented to the Trial Court's Ruling That An Agreement Not To Compete Between Potential Competitors Was A* Per Se *Violation Of The Anti-Trust Laws.*

This case was divided into separate trials for liability and damages. At the close of the liability phase of the trial but prior to charging the jury, the Court conducted a *voir dire* with respect to the parties' requested jury instructions. At that hearing, Bombardier's counsel conceded that the Court could properly instruct the jury that an agreement not to compete between potential competitors was a *per se* violation of the antitrust laws. The following colloquy occurred:

"Mr. Frank:	[Plaintiffs' Counsel] Will your Honor instruct in substance that an agreement between actual or potential competitors not to compete is a per se violation of the antitrust laws?
"The Court:	Yes. I want to hear from Mr. Vanderstar. That's been my assumption.

"Mr. Vanderstar:	[Bombardier's Counsel] Are we talking about division of markets or some other kind of agreement not to compete?
"The Court:	Division of markets.
"Mr. Vanderstar:	Well, if it's made specific that actual competitors, if they agreed to divide markets, violate the antitrust laws, *and potential competition* as well as potential is properly defined, I have no quarrel with that.
"The Court:	That's my understanding of what the law is. . . ." [emphasis supplied] (App. 3788).[13]

Having made that concession, it is no longer open to Bombardier to contend that an agreement to divide markets between potential competitors is not a *per se* violation of the antitrust laws. The Court of Appeals held:

> "Bombardier on appeal attacks the application of the per se rule to the arrangement with Agrati since it claims that the per se rule has never been read to reach an arrangement between the two companies, one of which is not yet already established in the market. Bombardier failed to object to this aspect of the jury instructions. We cannot

[13] The Court took defendants at their word, and instructed the jury, as follows:

> "The defendant does not contest the principal of law, that is to say, that competitors and potential competitors may not divide markets without violating the antitrust laws, but the defendant's position is that it is the law but it doesn't apply here because Bombardier was not at all that ready and able to get into the market."
>
> (App. 3868)

emphasize strongly enough that in the absence of plain error—and none is here found—a party should not attempt to undo an appeal what it failed to do at trial by way of jury instructions." (A15, fn. 10).

The Court of Appeals was correct. Even if Bombardier had raised an issue which might merit further consideration by this Court (and, as demonstrated below, it did not), its waiver of that issue in the trial court resolves the issue for the purposes of this case. F.R.Civ.P., Rule 51.

B. *The Decisions Of This Court Establish That An Agreement Not To Compete Between Potential Competitors Is A* Per Se *Violation Of The Sherman Act.*

1. *The Agreement Is Illegal Because Bombardier And Agrati Were Imminent Potential Competitors.*

The record establishes that in 1970, Agrati was actively and successfully selling minicycles in North America through ESI, and that Bombardier was about to make an "immediate move" into the minicycle market, which would bring it into direct competition with Agrati.[14] Bombardier recognized the technical superiority of the Agrati product.[15] Agrati feared and coveted Bombardier's marketing strength.[16] To avoid

[14] Bombardier's president testified that its product was similar to the Agrati minicycle and was designed to appeal to the same segment of the market. (A17; App. 1937, 2113, 3219).

[15] An internal Bombardier memorandum observes that other minicycles, especially the Agrati minicycle, offered "more sophisticated features" than did the Bombardier product. (App. 4800).

[16] Agrati's statements to ESI were replete with references to the effect that Bombardier "had decided to come into the motorcycle business, that they were going to be a formidable competitor", and that "they were so powerful that it insured them success". (App. 1337-1342).

competition between themselves, Bombardier and Agrati entered an agreement to refrain from competition in North America. Their agreement was a *per se* violation of the Sherman Act.

In *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972), a group of small supermarkets, who were not then in competition with each other, formed a cooperative association which acted as a purchasing agent for the group and distributed the purchased products under the Topco brand name to the group members. Members were assigned territories. Each had a "veto of sorts over actual or potential competition" by Topco members in its territory. 405 U.S. at 602. Most members had exclusive territories. No member could sell Topco products outside of its territory. Topco argued that it needed these restrictions to compete with larger chains. The trial court applied the "rule of reason" and found for the defendant. This Court reversed. It characterized the *Topco* agreement as an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition. It held that such agreements were "naked restraints of trade", and *per se* violations of Section 1 of the Sherman Act. 405 U.S. at 608. The Court specifically declined even to consider Topco's claim (here asserted by Bombardier) that the agreement not to compete among Topco's members was justified as a means of enhancing the ability of member companies to compete with larger supermarket chains.[17]

[17] In the light of the *Topco* holding, it is unnecessary to address Bombardier's factual argument that its agreement with Agrati was designed to permit each to compete more effectively with larger motorcycle manufacturers (Honda and Yamaha). Moreover, the jury specifically found that the Agrati minicycles competed in a relatively small market which did not include Honda and Yamaha, (Answers to Special Interrogatories 11 and 13; A.11-12), in which Agrati and Bombardier were the dominant factors, and in which competition was "significantly lessened" by the Bombardier/Agrati conspiracy. (Answer to Special Interrogatory No. 14; A12). Bombardier's own "Fun-Doo" was designed to appeal to this same segment of the market. (App. 1937, 2113, 3219).

The Topco participants, moreover, were potential, not actual, competitors. There, as here, the Topco members had not competed prior to their agreement, and the agreement precluded competition after the agreement. The *Topco* decision establishes that agreements to divide territories and not to compete between such potential competitors are illegal *per se*. Any doubt as to that conclusion was removed by *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 378 (1973), where this Court said, referring to *Topco*, "We recently reemphasized the vice under the Sherman Act of territorial restrictions among *potential* competitors". [Emphasis supplied.] The Courts of Appeals and the commentators have interpreted *Topco* in the same way. *Evans* v. *S.S. Kresge Co.*, 554 F.2d 1184, 1192 (3d Cir. 1976); *cert. denied*, 433 U.S. 908 (1977); *Dougherty* v. *Continental Oil Co.*, 579 F.2d 954, 958-59 (5th Cir. 1978), *vacated by stipulation*, 591 F.2d 1206 (1979); Von Kalinowski, 11 *Antitrust Laws And Trade Regulations*, Section 78.01(2), p. 78-16 (1978) ("The *per se* rule of horizontal market allocation agreements apparently applies to the parties thereto regardless of whether they are actual or potential competitors").

It is, therefore, clear that under the decisions of this Court an agreement between competitors to avoid competition which would otherwise exist, is illegal *per se*.

2. *The Court of Appeals' Decision Is Not Inconsistent With Any Decision By This Court Or Any Court of Appeals.*

Bombardier does not address the *Topco* decision. Instead, Bombardier asserts that the Court of Appeals decision was inconsistent with this Court's decision in *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158 (1964), which was decided eight years before *Topco*, and that it is at odds with the Second Circuit's decision in *Berkey Photo Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979); *cert. denied*, 100 S.Ct. 1061

(1980). In fact, the Court of Appeals is inconsistent with neither of those decisions.

Bombardier cites *Penn-Olin* for the proposition that the creation of a joint venture is not illegal *per se* even though the formation of a joint venture tends to foreclose competition between the joint venturers. Bombardier's argument is wide of the mark. An otherwise illegal express agreement not to compete between imminent competitors is not rendered permissible by the fact that it is to be effectuated by the creation of a "joint venture". The Court of Appeals stated (A21):

> "...joint ventures which partake of behavior identified as inherently pernicious to competition such as price fixing or territorial allocations will be judged under the per se rule rather than under the rule of reason. The talisman of 'joint venture' cannot save an agreement otherwise inherently illegal."

The Court of Appeals was clearly correct. *Topco* itself involved a joint venture. Moreover, in *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951), the Court declared illegal *per se* a series of agreements between related companies to divide markets and not to compete. The Court rejected the defendants contention that their division of markets was permissible because it was merely ancillary to a joint venture. It said at p. 598:

> "Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a 'joint venture'. Perhaps every agreement and combination to restrain trade could be so labeled."

In *United States* v. *Sealy, Inc.*, 388 U.S. 350 (1967), this Court similarly struck down a joint venture which was used to divide markets and customers.

Moreover, *Penn-Olin* is inapplicable to this case for at least three other reasons. First, the trial court in *Penn-Olin* found that Pennsalt and Olin were not potential competitors. It found that "both Pennsalt and Olin were far removed from the point of becoming actual competitors", and that, although Olin "was studying the desirability of going into the business, no decision to do so had been made". 217 F. Supp. 110, 135-136 (D. Del. 1963), and 246 F. Supp. 917, 928, 934 (D. Del. 1965).[18] In the case at bar, the jury found that Bombardier had both the intent and the ability to enter the market within a few months (at most) of the agreement not to compete. The joint venture was conceived as a device to avoid the competition which would otherwise have existed between Bombardier and Agrati.

Second, in *Penn-Olin*, this Court noted that there was no proof of specific intent to use the joint venture as a vehicle to eliminate competition and there were no collateral restrictive agreements between the joint venturers (378 U.S. at 176); there was no agreement not to compete. Here, there was an unmistakable effort to use the joint venture to avoid competition and there was an express collateral written agreement to divide markets.

Third, Bombardier's argument fails because it is unsupported by the facts of this case. The initial (November, 1970) agreement between Bombardier and Agrati contained the agreement not to compete described above and, in addition, contemplated the creation of a jointly-owned company in Canada to manufacture motorcycles. (App. 4824). That

[18] Bombardier's Petition (p. 10) states inaccurately that this Court concluded that Pennsalt and Olin had the resources and intent to enter the relevant market. In fact, this Court said only that "the possibility of individual entry...had not been completely rejected by either Pennsalt and Olin...". 378 U.S. at 167.

agreement, however, was later modified to eliminate the "joint venture" features and to provide that the joint venture would be formed only if the parties, after study, agreed that a joint venture would be feasible. (App. 4824-39, 4840-41, 4847-48). The same modification, however, restated the express agreement not to compete. In fact, as noted by the Court of Appeals (A21), the proposed joint venture aspect of the Bombardier-Agrati agreement "never materialized". The agreement not to compete was rigorously followed at all times. It is therefore apparent, as the Court of Appeals said (A21):

> "the restrictive covenants were not mere incidents to a joint venture, but were substantive agreements in themselves, with an existence independent of the joint venture."

Berkey Photo Inc. v. *Eastman Kodak Company*, p. 18 *supra*, is equally inapposite. There, plaintiffs challenged two separate joint development projects between Kodak (which manufactured cameras but not flash devices) and General Electric and Sylvania (which manufactured flash devices but *not* cameras). The court declined to hold the joint development agreement between firms in "complementary" markets illegal *per se*. There was in *Berkey Photo* no finding that Kodak was an imminent potential competitor of General Electric or Sylvania. There was no written agreement to refrain from competition once the jointly developed products were available to the public. The threat of competition was not used as a device to obtain an agreement not to compete. There was only an agreement between two non-competitors to refrain from publicizing the development of their complementary, technologically innovative products (camera and flash) until those products had been perfected and introduced into the market. That is a far cry from the express agreement not to compete between imminent competitors which is present in the case at bar.[19]

[19] Bombardier suggests a conflict between the Court of Appeals' treatment of this case and a Federal Trade Commission decision

Therefore, this case was correctly decided below and the Court of Appeals decision is consistent with the decisions of this Court and those of other Courts of Appeals.

II. The Petition Should be Denied Because the Court of Appeals Correctly Applied *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, and Because Petitioners Expressly Waived That Issue at Trial

A. *Preliminary Statement*

Bombardier alleges that the decision below is in conflict with this Court's decision in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). In *Brunswick*, a supplier of bowling equipment acquired certain financially weak retail bowling centers. The plaintiff, a competitor of some of the acquired bowling centers, alleged that the acquisitions violated Section 7 of the Clayton Act because they introduced a "giant" into a market of "pygmies". Plaintiff asserted that defendant had rescued firms which would otherwise have failed and that plaintiff was injured because it would otherwise have succeeded to the business of its financially weak competitors. This Court assumed that a properly instructed jury might find that

(*Brunswick Corp.*, Dkt. No. 9028, Trade Reg. Rep. (CCH) para. 21, 623 (1979)). A conflict between a court of appeals and an administrative agency is not ordinarily a ground for granting a petition for a writ of certiorari. Moreover, no conflict in fact exists. The FTC in *Brunswick* specifically cited the decision of the Court of Appeals below as establishing the proper test for the application of a *per se* analysis to a joint venture. *Id.* at p. 21,781 n. 23. The FTC declined to apply the *per se* rule only after finding, *inter alia*, that a joint venture was actually established which successfully produced a new product. Compare the FTC's decision in *SKF Industries, Inc.*, Dkt. No. 9046, FCC Complaints and Orders (CCH) para. 21,508 (1978), where (as here) an agreement not to compete, in which one firm withdrew from the manufacturing level in return for the exclusive distribution rights to the other firm's product, was held illegal *per se* under Section 1 of the Sherman Act.

the Clayton Act had been violated. It stated that the issue for decision was the "narrow" question:

> "whether antitrust damages are available where the sole injury alleged is that competitors were continued in business, thereby denying respondents an anticipated increase in market shares."
>
> —429 U.S. at 484.

The Court noted that defendant's conduct was illegal, if at all, not because defendant acquired retail bowling centers and not because it revived a moribund competitor, but rather because it introduced a "deep pocket" into a market of small competitors. However, plaintiff's alleged injury was unrelated to the introduction of a deep pocket into the market. It sprung instead merely from the *preservation* of competition. 429 U.S. at 487-488. Not surprisingly, the Court observed that "It is inimical to the purposes of [the antitrust] laws to award damages for the type of injury claimed here." 429 U.S. at 488. There was nothing "anticompetitive" about preserving competition. The Court held (at p. 489):

> "Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by violation. It should, in short, be 'the type of loss that the claimed violations...would be likely to cause'. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. at 125."

The Court noted that the plaintiff had made no substantial effort to prove that the defendant "abused its deep pocket" or that plaintiff had been injured by "such predation". 429 U.S. at 490.

Nothing in *Brunswick* suggests that this case was wrongly decided or is appropriate for review by this Court. On the contrary, for the reasons stated below, the trial judge and the Court of Appeals each concluded that the jury was warranted in finding that ESI's injury flowed from that which made Bombardier's conduct unlawful. Moreover, Bombardier conceded at trial that the jury could so find.

B. *Bombardier Waived Its* Brunswick *Argument In The Trial Court*

At trial, ESI contended, *inter alia*, that Bombardier used its status as an imminent potential competitor in the minicycle market, and the threat that it would enter the market with its own independent product in a manner which would "bury" ESI and Agrati, to persuade Agrati to enter into the agreement not to compete. The very thing which made the Bombardier-Agrati contract illegal — the desire to avoid competition between two independently manufactured products — was the thing which resulted in Agrati's refusal to sell to ESI. Moreover, since ESI's contract forbade sales by Agrati to Bombardier (because ESI was the instrument by which Agrati products would otherwise have been sold in competition with Bombardier products) and since ESI would not cooperate in the Bombardier/Agrati scheme, ESI had to be cut off in order to achieve the conspirators' anticompetitive purpose (the avoidance of competition between the Bombardier minicycle and the Agrati minicycle). Indeed, the very provision in the Bombardier/Agrati agreement which precluded competition between Bombardier and Agrati, required Agrati to terminate ESI. (App. 4824). As a result, ESI's injury literally flowed from that which made the conspirators' acts illegal. Bombardier now argues that the above does not constitute antitrust injury within the purview of *Brunswick*.

However, Bombardier expressly waived this contention at the trial. During the argument on defendants' motions for a directed verdict, plaintiffs' counsel stated, *inter alia*, that plaintiff suffered "antitrust injury" for the reasons described above. Bombardier's counsel acknowledged that such conduct, if proven, would satisfy the requirement set forth in *Brunswick*. The following colloquy appears at App. 3736-3737:

"Mr. Vanderstar:	[Bombardier's counsel]...I don't think there is any evidence that Agrati was sitting there contentedly doing business with ESI and then this giant from Canada came in and said: We're coming into the marketplace and will drive your product out of the marketplace unless you agree with us.
"The Court:	That is precisely the plaintiff's point.
"Mr. Vanderstar:	There is no evidence to support it, your Honor.
	* * * *
"The Court:	That is what he says is the whole case.
"Mr. Vanderstar:	If the case is served up to the jury on that basis—
"The Court:	All right.
"Mr. Vanderstar:	—obviously, we will ask the jury to find in our favor.
"Mr. Fremont-Smith:	Oh, sure.
"The Court:	I think that is how it is being served up.
"Mr. Vanderstar:	All right. *That is fine, as long as it is made clear to the jury but that is*

> *what they have to find in order to find an anti-trust violation; they have to find that it was Bombardier's threat to Agrati and Agrati's fear of the entry of Bombardier into the marketplace that caused Agrati to terminate ESI; and, if that is the way the case is put to the jury, I am perfectly content, your Honor."* [Emphasis Supplied]

The parties each argued this issue to the jury. (App. 3790-91, 3794-3799). The Court gave the charge to which Bombardier had consented. (App. 3867-3873). Bombardier did not object to that charge. (App. 3909-3914). The jury found for the plaintiff.

It is now too late for Bombardier to complain. "No party may assign as error the giving [of]...an instruction unless he objects thereto before the jury retires to consider its verdict." F.R.Civ.P., Rule 51.

It is, therefore, clear both that plaintiffs were injured by that which made defendants' conduct illegal and that the defendants are precluded from arguing otherwise.

C. *The Appeals Court Correctly Applied* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc. *to the Facts of This Case. Its Decision Is Not Inconsistent With the Decisions of Other Courts.*

The Petition attempts to manufacture a non-existent conflict between the Circuits by a flat mischaracterization of the Court of Appeals' decision. Bombardier contends that the Appeals Court failed to "apply *Brunswick*" and held that *Brunswick* "applies only in cases that involve Section 7 of the Clayton Act, not in Sherman Act Section 1 cases like this one."

(Petition, p. 15). In fact, the Court of Appeals, as one of several preliminary observations, noted that one of the distinctions between this case and *Brunswick* is that ESI's injury resulted from a violation of Section 1 of the Sherman Act (which by definition entails an actual restraint on competition) as distinguished from a violation of Section 7 of the Clayton Act (which only requires proof of *potential* anticompetitive effect). However, notwithstanding this distinction, the Court of Appeals went on to treat *Brunswick* as applicable to this case and, after careful analysis of the particular facts of this case, it concluded that ESI was injured by "that which makes defendant's acts unlawful" and that it had suffered "antitrust injury". (A22-30).

The Court cited other distinctions between this case and *Brunswick, viz*:

> "(2) Plaintiffs in *Brunswick* never proved that they had actually suffered any harm, but only that they had suffered defeat of their expectation of additional profits. Here, by contrast, plaintiffs suffered actual harm.[20] (3) There was no proof of anticompetitive behavior by defendant Brunswick; there was such proof here.[21] (4) In *Brunswick* there was no dimunition of competiton — the

[20] Compare this with the situation in *Brunswick*, where, as this Court pointed out, "responents complain[ed] that by acquiring the failing centers, petitioner preserved competition, thereby depriving respondents of the benefits of increased concentration." 429 U.S. at 488, and where this Court recognized:

> "...competitors may be able to prove antitrust injury before they actually are driven from the market and competition is thereby lessened. Of course, the case for relief will be strongest where competition has been diminished." 429 U.S. at 489, fn. 14.

[21] Compare this with the situation in *Brunswick*, where this Court was careful to point out that plaintiff had presented no evidence that defendant possessed an anticompetitive motive or that predatory conduct had been directed at the plaintiff. 429 U.S. at 479-480.

failing businesses were revived by the defendant and the plaintiffs continued as healthy enterprises. ESI went out of business not long after the alleged injury". (A24)[22]

Then, applying the *Brunswick* test, the Court observed that (unlike the plaintiff in *Brunswick*, which was injured as the fortuitous result of Brunswick's rescue of a failing competitor), ESI was eliminated as a competitor in the sale of minicycles precisely because it stood in the way of the proposed anticompetitive scheme to divide markets. As stated by the Court of Appeals (App. 25):

"ESI introduced evidence that not only had Bombardier and Agrati illegally conspired to allocate markets between themselves, but, as a necessary consequence, had determined to eliminate ESI as a competitor at the same time. Because of its exclusive distributorship with Agrati, ESI stood in the way of the conspiracy's aim to allocate the sales market for minicycles to Bombardier."

The Court of Appeals pointed out that ESI's injury flowed directly from that which made defendants' conduct illegal — Bombardier's and Agrati's desire and agreement to avoid competition:

"It was Bombardier's stance as an imminent potential entrant in the market which induced Agrati to succumb to Bombardier's blandishments. . . . It was Agrati's desire to stave off an immediate threat of competition by Bombardier which spurred it to cancel ESI and then agree to the strategy of declaring a default in November. It was Bombardier's urgent desire to put a summertime product on the market forthwith which led to the sudden excising of ESI as Agrati's exclusive dealer. . . . This was a quid pro quo: Agrati would surrender its current dealership with ESI in exchange for the promise of no competition from Bombardier and Bombardier would exchange its ability to enter the market against Agrati in exchange for the exclusive dealership as well as a promise of no competition from Agrati. In short, it was Bombardier's position as an imminent competitor which impelled Agrati to accede to its demands... And in order to accomplish the division of markets, it was necessary to deprive ESI of the Agrati product, which was done precipitously with no lead time thus depriving ESI of the opportunity to obtain its supplies from another source. The ineluctable result of the allocation of markets was that Agrati could no longer provide minicycles to ESI. *See United States* v. *Topco, supra*, 405 U.S. at 612, 92 S.Ct. 1135. We have here the type of *antitrust* injury which was found lacking in *Brunswick*." (A28-A30).

Bombardier now surmises that ESI was better off (once it was terminated) because it was spared from having to compete against both Agrati and Bombardier products. Petition, p. 16. However, the evidence establishes that it was Bombardier's threat of independent competition and its insistence on an agreement not to compete with Agrati which had caused ESI's termination and much of ESI's injury in the first place.

ESI's injury was "of the type which the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful" (429 U.S. at 489) for yet another reason. The purpose of the prohibition of non-competition agreements between competitors at the same level of trade (such as Bombardier and Agrati) is to prevent a reduction (or encourage a proliferation) of competitive products and competitors. The benefits of such increased competition flow not

[22] The Court of Appeals correctly stated:
"This situation is thus not akin to that in *Brunswick* where competition was actually fostered by the continued presence of the once-failing businesses. Here, competition was curtailed, both as between Agrati and Bombardier and in that ESI was driven out of business and thus eliminated as a competitor." (A28)

only to ultimate consumers, but to all those who (like ESI) participate in the competition between independent products and thereby have the opportunity to earn profit. As the Court of Appeals stated, Bombardier's conduct indisputably reduced the number of competitive products that would have been in the market and deprived ESI of the opportunity to participate in the competition between Bombardier products and Agrati products. (A27). ESI was, therefore, injured by the "anticompetitive effect" of the illegal agreement not to compete.

In dissenting from the Court of Appeals reaffirmation of its ruling on standing, Chief Judge Coffin further explained the Court's reasoning with respect to ESI. He said:

> "The underlying substantive antitrust violation which gave rise to this case was a horizontal agreement between Agrati and Bombardier to allocate territorial and product markets between themselves and terminate ESI's role in the distribution of Agrati minicycles. . . In this case, it is possible that the purchasers of minicycles, including ESI...would have benefited had Bombardier chosen to compete with Agrati rather than illegally agreeing not to do so. '[H]ad Bombardier and Agrati not so conspired, there would have been *two* minicycles...to choose from rather than the *one* that the conspiracy delivered up.' 605 F.2d at 14. In any event, ESI's bargaining power vis-a-vis Agrati most certainly would have been increased had Agrati not succeeded in securing Bombardier's agreement not to compete in the manufacturing and selling of minicycles.
>
> "This is not to say that ESI necessarily would have retained its ability to purchase minicycles for distribution. It is to say, rather, that the question whether ESI would retain that ability would have been determined by the forces of competition rather than by agreement between competitors. '[T]he freedom guaranteed each and every

> business, no matter how small, is the freedom to compete to assert with vigor, imagination, devotion and ingenuity whatever economic muscle it can muster. Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because [others so agree].' *United States* v. *Topco Assoc.*, 405 U.S. 596, 610 (1972). Because the damage to ESI caused by the Agrati-Bombardier Agreement was the loss of that freedom, we correctly found that it is able to recover antitrust damages against the defendants."

Moreover, as noted above, this Court in *Brunswick* stressed the absence of any anticompetitive motive by defendant or predatory conduct aimed at the plaintiff. Here, on the other hand, as part of the agreement not to compete, Bombardier and Agrati engaged in a course of pedatory conduct which, the jury found, was designed to drive ESI from the market. (Jury's Answer to Special Interrogatories No. 10, A11). The Court of Appeals said:

> "ESI introduced evidence of Bombardier's threats to enter the market independently againt the Agrati line unless Agrati agreed to do business with it. Bombardier urged Agrati to cut ESI off precipitously with no advance notice, thus depriving ESI of the opportunity to search for an alternate source of supply prior to termination. Bombardier then later attempted to dissuade Agrati from supplying parts to ESI which were contractually called for, even in case of cancellation. There was proof that Bombardier deliberately underpriced its Agrati cycle vis-a-vis the price of ESI's Broncco and that Bombardier used deceptive means for obtaining inventory, pricing and other information from ESI. In essence, as part of the territorial scheme, Bombardier worked to eliminate ESI as a viable competitive force in the minicycle market. Bombardier had indicated to ESI distributors that they would

no longer have exclusive rights to the Broncco and that Bombardier itself would soon be marketing the Agrati-made cycles. Bombardier released press statements that it would now be carrying the Agrati line. Had Agrati been free to sell in North America through its former distributor ESI, Bombardier could not have claimed exclusivity on the Agrati models nor intimidated ESI distributors with the threat of the loss of their exclusivity and their ability to obtain needed spare parts." (A26)[23]

Unlike the situation in *Brunswick*, the Court of Appeals properly concluded there was here

"...adequate evidence to support a finding that the territorial scheme with its corresponding unfair and anticompetitive behavior aimed at ESI, was a material factor in plaintiff's injury." (A-26).

Finally, there exist two independent grounds for finding that antitrust injury exists. First, in this case:

"ESI was offered inducements for acceding to the conspirators' wishes and only after refusing to do so was cancelled." (A25).

In this respect, the injury that ESI suffered is precisely the same type of injury suffered by the plaintiff in *Albrecht* v. *Herald Co.*, 390 U.S. 145, *reh. denied*, 390 U.S. 1018 (1968),

[23] As noted above, Bombardier's "contumacious behavior" (A40, fn. 27) did not cease with the filing of this lawsuit in January, 1971, or even with the District Court's issuance of a preliminary injunction in September of that year. Rather,

"[N]otwithstanding the fact that the [District] Court twice indicated that the injunction covered spare parts, both Bombardier and its subsidiaries continued to sell them, up until and after the time a motion for contempt was filed in February, 1972, by ESI." (A39-A40).

and the legion of other cases in which plaintiffs were awarded damages because they were terminated or otherwise punished for refusing to join in a conspiracy which is illegal *per se* under the antitrust laws. *See, e.g., Interphoto Corp.* v. *Minolta Corp.*, 295 F. Supp. 711 (S.D.N.Y.), *aff'd*, 417 F.2d 621 (2d Cir. 1969). It would seem far too late to argue that the plaintiffs in those cases did not suffer "antitrust injury". Those, and similar cases, are designed to preserve the freedom of individual market participants to compete independently. A refusal to sell to such a competitor in order to punish that competitor for not participating in an anticompetitive scheme — particularly an agreement not to compete — is indisputably "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the acts unlawful". *Brunswick*, 429 U.S. at 489.

Second, the Bombardier/Agrati agreement was, among other things, an agreement between potential competitors at the same level of trade which limited the customers to whom Agrati might sell. In *Topco*, this Court struck down the aspect of the Topco agreement which prohibited sales by Topco members (who were potential competitors) to third persons who proposed to purchase Topco products for resale to consumers. 405 U.S. at 612. *See also: Klor's Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). In this respect, the Bombardier/Agrati agreement is precisely the same as the Topco agreement. ESI was injured by the "anticompetitive effect" of the Bombardier/Agrati agreement limiting the customers to which Agrati could sell. It was literally destroyed by that which made the agreement illegal.

Accordingly, additional independent bases for finding "antitrust injury" were presented here which the Court below noted but found unnecessary to decide. See A25-26, and additional cases there cited.

Moreover, in the context of the facts described above, the asserted "conflict" between the Courts of Appeals is

non-existent. *John Lenore & Co.* v. *Olympia Brewing Co.*, 550 F.2d 495 (9th Cir. 1977) [Petition, p. 13], involved a distributor which was unilaterally terminated by his supplier in favor of its own distributorship network following a merger. In the instant case, ESI was terminated because it was the obstacle to the effectuation of an anticompetitive scheme and ESI was intentionally driven out of business by unfair means.

The case is similarly distinguishable from the opinions in *Kirihara* v. *Bendix Corp.*, 306 F. Supp. 72 (D. Hawaii, 1969) [Petition, p. 13], (where the Court stressed the complete absence of any purpose to coerce, or of any anticompetitive motive for the termination (at 78-79)), and *Reibert* v. *Atlantic Richfield Co.*, 471 F.2d 727 (10th Cir.), *cert. denied*, 411 U.S. 938, *reh. denied*, 412 U.S. 945 (1973), [Petition, pp. 13-14] (a suit by a former employee of a merged company, where "no evidence [was] submitted intimating that appellant's discharge was for any reason other than the duplication of jobs occasioned by the merger" (at 728). The Court (at 730-731) expressly distinguished that situation from cases like the case at bar in which an "antitrust violation [had been] directed against the blackballed party").

The other district court opinions cited by Bombardier are not inconsistent with the Court of Appeals decision. In *Outboard Marine Corp.* v. *Pezetel*, 461 F. Supp. 384 (D. Del. 1978) [Petition, p. 14], the Court held that *Brunswick* is applicable to a Section 1 violation, but that the mere elimination of intrabrand competition by defendant there could not have injured, but could only have benefited the plaintiff (at 401-402). In the case at bar, the Court of Appeals also applied *Brunswick* to a Section 1 case, but found that the threat of interbrand competition was used as a club to obtain an agreement prohibiting such competition, and that the agreement severely injured ESI. *Murphy Tugboat Co.* v. *Crowley*, 454 F. Supp. 847 (N.D. Cal. 1978) [Petition, p. 15, fn. 10] also held that *Brunswick* is applicable to a Section 1 case, and that

plaintiff had failed to assert antitrust-type damages when it offered to prove that it "was compelled to charge competitive rates, [and] was precluded from increasing its rates to higher levels" and consequently lost profits due to defendant's failure to raise its own prices. The court expressly distinguished that situation (at p. 852) from cases "involving [a plaintiff's] partial or total exclusion from the market". In both *Hauer* v. *Bankers Trust New York Corp.*, 450 F. Supp. 103 (E.D. Wisc. 1978) and *Laughlin* v. *Wells*, 446 F. Supp. 48 (C.D. Cal. 1978), the Courts found that *Brunswick* was applicble, and held that, as here, plaintiff's injury arose as a direct result of the antitrust violation.

Indeed, all of the Circuit Courts which have applied *Brunswick* to Section 1 violations similar to that presented here, are in agreement that *Brunswick* should not be construed so as to deny relief to a distributor in ESI's position. See *Lee Moore Oil Co.* v. *Union Oil Co.*, 599 F.2d 1299, 1301-1304 (4th Cir. 1979); *Ohio-Sealy Mattress Mfg. Co.* v. *Sealy, Inc.*, 585 F.2d 821, 831-833 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979).

III. The Petition Should Be Denied Because There Were Independent Grounds for Affirming the Judgment Below.

ESI alleged and proved that Bombardier, in addition to agreeing not to compete with Agrati, also violated Section 1 of the Sherman Act by conspiring to eliminate ESI as a competitor in the mincycle market. *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 508 F.2d 547 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975).

This aspect of ESI's case was submitted to the jury under the "rule of reason" standard expressly approved by *Whitten, supra* at 562, and by many other courts which have addressed this type of antitrust violation. See *Tower Tire And Auto Center, Inc.* v. *Atlantic Richfield Co.*, 392 F. Supp. 1098

(S.D. Tex. 1975); *Mr. Hanger, Inc.* v. *Rizzuto*, 410 F. Supp. 1158 (S.D.N.Y. 1975); *Snyder* v. *Howard Johnson's Motor Lodges, Inc.*, 412 F. Supp. 724 (S.D. Ill. 1976); *La Preferida, Inc.* v. *La Victoria Foods, Inc.*, 1978-2 Trade Cas. para. 62,240 (N.D. Ill. 1978); *Northwest Power Products, Inc.* v. *Omark Industries, Inc.*, 576 F.2d 83 (5th Cir.) *reh. denied*, 579 F.2d 643 (1978), *cert. denied*, 439 U.S. 1116 (1979); *Petroleum for Contractors, Inc.* v. *Mobil Oil Corp.*, 1978-2 Trade Cas. para. 62,151 (S.D.N.Y. 1978); *A.D.M. Corp.* v. *Sigma Instruments, Inc.*, 481 F. Supp. 1297 (D. Mass. 1980).[24] The trial judge properly instructed the jury on the requisite elements of a rule of reason case,[25] and the jury made the following specific findings: (1) that Bombardier and Agrati conspired to drive ESI out of the business and used unfair means to do so (Special Interrogatory No. 10, A11); (2) that ESI's Broncco minicycle competed in a relatively narrow submarket which did "not include the Yamaha Mini-Enduro and Honda Trail '70 but did include minicycles such as Indian, Yankee Boss, and Premier BB" (Special Interrogatory No. 13, A12); and (3) that competition in that submarket was significantly lessened as a result of the conspiracy (Special Interrogatory No. 14, A12). The jury concluded "that Bombardier injured ESI by conspiring with Agrati-Garelli to eliminate ESI as a competitor". (A11).

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[24] Since ESI's claim was submitted to the jury under the "rule of reason" standard, it is not necessary to consider the additional question raised by some of the cited cases, namely, whether conspiring to eliminate a competitor by unfair means might also constitute a *per se* violation of the Sherman Act. While *Whitten* and several other cases have held that a *per se* rule would apply to the facts of this case, all of the cases agree that a violation may be shown, as it was here, under the "rule of reason" approach.

[25] The judge instructed the jury as follows (App. 3889-90):

> "So those are the essential elements on this last claim: conspiracy; intent and purpose of the conspiracy; object is to eliminate a distributor by unfair means; and having a significantly damping or suppressing effect on competition in the affected submarket, which you must decide upon for reasons that I have just explained."

Despite the District Court's ruling in denying defendants' post-trial motions that "the proper fact questions were submitted to the jury and that its answers were supported by substantial evidence", (App. 1217), petitioner continued to claim below that the jury could not reasonbly have made the above findings. The Court of Appeals found it unnecessary to reach this question (A32-A33), although it did rule that the jury properly concluded that "defendants injured ESI by conspiring with Agrati not to compete and to eliminate ESI as a competitor". (A11, 25-27).

ESI submits that the jury's findings amply support its conclusion that Bombardier violated Section 1 of the Sherman Act. See *Whitten* v. *Paddock Pool, supra*. There is, therefore, an entirely independent basis for sustaining the judgment below.

Conclusion

For the reasons stated above, the Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit should be denied.

Respectfully submitted,

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APPENDIX I

United States Court of Appeals
For the First Circuit

No. 78-1492.

ENGINE SPECIALTIES, INC., ET AL.,

PLAINTIFFS, APPELLEES,

v.

BOMBARDIER LIMITED, ET AL.,

DEFENDANTS, APPELLANTS.

Before COFFIN, *Chief Judge*,
BOWNES, *Circuit Judge* and
PETTINE, *District Judge.**

ORDER

Entered September 21, 1979

The petition for rehearing is granted, but is limited to the filing of memoranda or briefs only. There will be no oral rehearing. The parties are granted leave to file supplemental memoranda or briefs on the issue of the standing of Durham and Watercraft to recover under the horizontal restraints theory.

Memoranda or briefs shall be filed on or before October 9, 1979.

By the Court:
DANA H. GALLUP, *Clerk*

By /s/ FRANCIS P SCIGLIANO
Chief Deputy Clerk.

[cc: Messrs. Vanderstar, Fremont-Smith and Galvani.]

*Of the District of Rhode Island, sitting by designation.